REVIEWS.

Elements of American Jurisprudence. By WILLIAM C. ROBINSON, LL.D., Whiteford Professor of Common Law in the Catholic University of America. Boston, Little, Brown & Co., 1900. — lviii, 401 pp.

It is not easy to indicate the proper shelf for this book in a law library, unless we assign a special place to introductory works in general; nor is it easy to relegate the author to any school of jurisprudence, unless we construct for his benefit an eclectic school. The difficulty of placing the author is, in fact, occasioned not by the originality of his theories, but by his practice of presenting alternately, and often in close juxtaposition, the phrases — I might almost say the war cries — of the natural-law school, the historical school and the analytical school. Human law is "the projection of the eternal law into the daily actions and forbearances of men" (§ 7). Bad laws not only tend to become obsolete or to be repealed: they are "invalid" from the outset (§ 8 and § 221, subsection 4). Rights are "inherent": they are based upon and exist by virtue of "the eternal law" or "natural law" (§§ 120–122); and a legislature, although restrained by no constitutional prohibition, "cannot enact a law which palpably infringes any of those rights to assert and defend which the state has been established" (§ 276, subsection 4). At the same time, law is a historical product, and a product of custom far more than of legislation. As a factor in the making of law, custom is of the same force as legislation; for written laws may become obsolete by disuse (§ 8) and may be superseded by contrary usage (§ 228). It is not merely in the earlier stages of legal development that custom makes law: new customs are arising and new law is thus being made at the present time (§ 223). Even to-day custom constitutes the more important part of our law: the written law is "the servitor and subordinate of the unwritten law" (§ 238). That written law can ever wholly replace unwritten law is "an idle dream." If the attempt be made by codification to reduce the entire law of a state to the written form, the state will either sink into decay under the dead weight of its changeless rules, or it will outgrow its codes

and make them merely the nucleus about which will accumulate a constantly increasing mass of statutes and customary laws (§ 262). Little of Bentham here! And yet, while the voice of the author is the voice of the historical Jacob, he repeatedly assumes in patches the skin of the analytical Esau. "National law emanates from the supreme authority in the state" (§ 166). It is the sum of "the rules of conduct dictated by the reason and imposed by the will of the sovereign" (§ 365). Only by receiving "the sanction of the state" are customs "transmuted into law" (§ 216). International law is not, to the author, a mere system of morals; he recognizes it as customary law (§§ 171, 226, 402); but he throws a sop to the analytical jurists by premising that its rules, "having been adopted and sanctioned by each individual state, and expressly [?] made a part of its own laws, have become binding upon itself and its citizens like any other portion of its laws" (§ 11).

I do not say that these expressions are wholly irreconcilable. The historical development of law may, of course, be regarded as a progressive revelation of "the eternal law" or as a progressive approach to "natural law." And when the author speaks of "the state" or "the sovereign," he uses these words in a very elastic sense. Like the analytical jurists, he impliedly extends the term "state" to include all the subdivisions of the national state in which legislative power is exercised, and the term "sovereign" to include all legislative organs, from a constitutional convention to a town meeting. He goes farther, however, than the analytical jurists of the stricter sect, in recognizing that the "sovereign" makes law through the action of the judicial and executive branches of government, as well as through that of the legislative branch. The law-making power of the courts is expressly recognized (§§ 166, 219 and *passim*); the law-making power of the executive branch, within its field of action, is recognized by necessary implication in some of his remarks regarding international, constitutional and administrative law. The customs which constitute international law (§§ 11, 226) have been developed, for the most part, through the acts and forbearances of the executive branches of the different national governments, and in many cases no "adoption" of these customs as the national law of the individual states can be discovered except in the persistent conduct of their executives. The customs which are "unwritten constitutional law" (§§ 245, 248) have likewise been developed, in part at least, by acts and forbearances of the executive. This is especially true of the gradual adjustment, both in England and in our country,

of the relations of the central and local powers, and of the relations of the executive, legislative and judicial branches *inter se*. In one passage, at least, the author expressly recognizes that the acts of the executive branch have made law. A part of "the unwritten law of the United States," he says, has been developed "in the government of the Territories and the District of Columbia," and "in the administration of the patent, copyright and revenue systems" (§ 226). And in § 214 he gives us a formula broad enough to cover these and all other developments of customary law, when he asserts that law may be established "by acquiescence in present action and acceptance of results." The question whether the body that acts or the body that acquiesces is the law-making body is scholastic, rather than practical; but it may perhaps be fairly argued that the acceptance of the latter theory would make a legislative act a mere proposal of a rule, to be transmuted into law by general acquiescence.

If Professor Robinson has, in this fashion or in any other fashion, reconciled in his own mind the apparently antagonistic dicta of the warring schools, his reason for attempting no express reconciliation is probably to be found in the fact that such an attempt would take the beginner into bewildering fields of controversy and criticism (*cf.* Preface, pp. viii and ix); but if he has worked out any such reconciliation as is here indicated, it is hard to understand why, even in writing for beginners, he does not quietly drop the misleading phrases of the British formalists or limit their application to "written" law.

The other difficulty indicated at the beginning of this notice — the difficulty of placing the work itself — arises from the somewhat unusual combination of subjects in the book. Nearly half of it is devoted to what is commonly called "jurisprudence"; *i.e.*, to the discussion of law and rights in general. The other half — roughly, two hundred pages — is devoted to American law, but is by no means a well-balanced or complete exposition of even the principal features of American law; for a hundred pages are occupied with the law of persons (including corporations), and fifty pages with the organization of the American courts, so that only about fifty pages are left for all the other branches of the law, public and private, substantive and remedial; and of these fifty pages eighteen deal with fictions and presumptions. The make-up of the book is perhaps ascribable to an effort so to extend a course on general jurisprudence as to fill the principal *lacunæ* in the scheme of the average American law school; and from this point of view it is perhaps justifiable.

The author's statements regarding American public law, and regarding that portion of American jurisprudence which is also general jurisprudence, suggest a few criticisms. His assertion (§ 56) that "citizenship by birth vests in all persons born in any part of the world whose parents are citizens of the United States" is unduly broad; and the statement in the same section that "the admission of new territory with its population into the Federal Union *as a state* bestows . . . citizenship upon all its members" (the italics are mine) is unduly narrow. Administrative law is recognized as a special division of public law (§ 178); but its rules, so far as they are set forth (law of officers and law of public corporations), are concealed in the law of persons (§§ 46–53, 106–112). The author's inclusion, among rules of law, of rules self-imposed (§§ 1, 6, 171) will not be accepted by any reader who regards the sanction as an essential part of a rule of law; and it may be noted that the only illustration given in the field of human law is no illustration, since the state does not limit itself, but only its governmental organs. In § 65 the author apparently classes the status of infancy among "varieties of status altogether artificial." In § 71, where he sets forth the essential characteristics of a corporation, he omits what has been regarded, from Roman times, as one of these characteristics — namely, the exclusion of the direct and primary liability of the individual associates, leaving this to be inferred from what is said of unincorporated associations in § 87. In § 78 he asserts that if two corporations be created, with charters "identical except as to the artificial personality which they create, priority of action on the part of either corporation in pursuance of its charter would clothe it with the right to occupy the field in preference to the other." This statement, obviously, is true only as regards those corporations whose powers are of a monopolistic character, and not true of the charitable corporations and banking corporations mentioned in the same section. "Antecedent rights" are defined as those which inhere in persons "irrespective of the wrongful acts or defaults of other persons" (§§ 126–128), and "remedial rights" as those which are vested in persons "as the result of some wrongful act or default on the part of other persons" (§ 126, 129, 130); and in § 163 it is asserted that the division of all law into "substantive" and "adjective" law is based upon this same distinction — that "substantive law is the law governing antecedent rights" and "adjective law is the law governing remedial rights." Later on, however, it appears that the law of torts and the law of crimes, neither of which can be

conceived of "irrespective of wrongful acts or defaults," are substantive law (§§ 176, 392). The mistake is, I think, in the last statement. The definition and prohibition of wrongs is logically part of the remedial process, and the law of crimes and torts is remedial or adjective, not substantive, law. To employ against the author a distinction which he has worked out in some of the most admirable sections of this book (§§ 156–161) his view sacrifices the "logical" to the "chronological" relation between rights and wrongs.

In § 139 the author says that "wrongs against negative duties admit of no degrees." This would appear to imply that battery and murder, which are violations of the duty to respect other men's physical integrity, and trespass and ejectment, which are violations of the duty to respect other men's property rights, are respectively wrongs of equal degree. Otherwise the author must assume, as corresponding to every right *in rem*, not a simple general duty of forbearance, but a complex of duties corresponding to express legal prohibitions, which elsewhere he does not seem to do.

The least satisfactory part of the book is that dealing with conflicts of law. Allegiance and domicile are connected in an unfortunate and confusing manner (§§ 66, 196, 197). *Lex ligeantiæ* or *lex domicilii*, and not *lex loci actus*, is said to govern capacity to contract (§§ 196, 199). *Lex domicilii* is said to govern transfers of personal property by gift or contract (§§ 116, 197). It is asserted that when, in order to apply for a divorce, a married woman finds it necessary to possess a different domicile from her husband's, "she can obtain a new one like any other person" (§ 68). None of these statements are in accord either with general international usage or with the tendency of English and American decisions. In another part of the book (§ 311) the statement is made that, when a party to a controversy has obtained a judgment, he cannot afterward sue on the original cause of action. To bar misconception, the author should, of course, have added "in the same state."

The merits of the book are very great. It is not a mere compilation, but the product of serious and independent thinking. The conclusions which the author has reached are set forth clearly and in a very attractive way. If this review has been devoted largely to criticism and to suggestion of possible emendations, it is because the reviewer anticipates that the book will appear in more than one edition.

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